UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of: Con-Way Freight, Inc., and Jaime Romero, an individual, Con-Way Freight, Inc., and Juan Placencia, an individual, Con-Way Freight, Inc., Employer, and International Brotherhood of Teamsters Union, Local 63 Petitioner.	)	Cases: 21-CA-135683 21-CA-140545 21-RC-136546

TEAMSTERS LOCAL 63'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

Petitioner International Brotherhood of Teamsters, Local 63 ("Local 63" or the "Union") submits this Answering Brief in response to Con-Way Freight, Inc.'s ("Con-Way" or the "Company") Exceptions and Brief in Support of Exceptions to the Hearing Officer's Report on Objections.

An election conducted on September 24, 2014 resulted in a victory for employees voting for union certification. Con-Way voiced no problems with the election process until it lost the election – no charges or complaints were registered during the union campaign, and no complaints were made to the Board Agent conducting the election during its process. But when Con-Way found out that it had lost the election, it filed various objections alleging a pervasive atmosphere of threats and fear. The lack of merit to many of these objections quickly became obvious at the hearing before the Administrative Law Judge, as the Company failed to present even a shred of evidence supporting them.

After an eight-day hearing on the unfair labor practices filed by Charging Parties Placencia and Romero and objections filed by the Company, as well as briefing by the parties, Administrative Law Judge ("ALJ") Eleanor Laws issued a 42-page Decision and Report on Objections ("Decision") finding that the Company committed various unfair labor practices and overruling all of the Company's objections to the election. Judge Laws' conclusions of law and fact are thorough, well-researched, and reasoned. Significantly, every single allegation in this case rests on credibility determinations. It is well settled that "[t]he ALJ's assessment of credibility is entitled to great weight and deference, since he had the opportunity to observe the witness's demeanor." *Infantado v. Astrue*, 263 Fed. Appx. 469, 475 (6th Cir. 2008) (citations omitted). On the whole, for the reasons set forth below, the ALJ found the Union's witnesses credible and the Company's witnesses less so. Because the allegations in this case turn on

questions of credibility, the Decision should not be disturbed.

Con-Way's Exceptions and Brief in Support of Exceptions ("Respondent/Resp. Brief") raise little, which has not been addressed and resolved by the Decision. Accordingly, the Union respectfully requests that the ALJ's Decision be affirmed in its entirety and that the Union is certified as the exclusive representative of the employees of Con-Way.

II. PROCEDURAL AND FACTUAL BACKGROUND

Con-Way is a freight transportation trucking company, which transports and delivers commodities to both commercial and residential customers. (Tr. 44:15:19.)

After an organizing campaign, an election was held on September 24, 2014. (General Counsel ("GC") Ex. 1(x), p. 3.) Twenty-Two (22) votes were cast for the Union and twenty (20) votes were cast against the Union. (*Id*.)

The Company challenged the ballots of Jaime Romero and Juan Placencia on the basis that they had been terminated prior to the election.[1] (*Id*.)

Following the tallying of the ballots, both the Company and the Union filed several objections to the election. On July 20, 2015, the NLRB approved of a stipulation between the Company and the Union whereby the Union agreed to withdraw its objections to the election. (GC Ex. 1(ab).) The parties also stipulated not to open or count Mr. Romero's and Mr. Placencia's ballots, and the NLRB issued a Revised Tally of Ballots that finalized the vote count at twenty-two (22) being cast in favor of the Union and twenty (20) cast against. (*Id*.)

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[1] Both Mr. Romero and Mr. Placencia filed unfair labor practice charges against the Company based upon their wrongful terminations, which are the subjects of Case Nos. 21-CA-135683 and 21-CA-140545. The Union did not represent either Mr. Placencia or Mr. Romero at the hearing. However, as noted throughout this brief, the factual circumstances leading to Mr. Placencia's termination overlapped with some of the Company's objections to the election, the subject of Case No. 21-RC-136546.

A. THE COMPANY'S POST-ELECTION OBJECTIONS.

Even though the Company voiced no concerns prior to the election, upon losing the election, it filed several objections based upon the Union's alleged conduct during its campaign. On October 30, 2014, the Company filed the following obscure objections:

> **Objection No. 1:** During the critical period, the Union and its representatives, agents and supporters engaged in threatening intimidating, coercive and abusive conduct directed at the Employer's employees, supervisors, managers, consultants, and others, which threatened, intimidated, and coerced employees, placed the in fear for their safety, and placed them in reasonable fear of retaliation, retribution, and other reprisals if they did not support or vote for the Union in this election.
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> **Objection No. 2:** This objection was withdrawn at the hearing by the Company. (Tr. 926:8-9.)
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> **Objection No. 3:** Even if the conduct set forth in Objections 1 and 2 above, cannot be attributed to the Union or its agents, this conduct constituted improper third-party conduct that, either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election and interfered with the election result inasmuch as it constituted improper pressuring, threatening, coercion, and intimidation of eligible voters.
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> **Objection No. 4:** A general atmosphere of fear, coercion and confusion was created during the critical period by the Union and its representatives, agents or supporters, or by third parties, that interfered with the employees' ability to exercise a free, fair, uncoerced choice in this election and interfered with the conduct of the election and the election result.
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> **Objection No. 5:** The conduct set forth in Objections 1, 2, 3, and 4, above, either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election, interfered with the employees' ability to exercise a free, fair, and uncoerced choice in this election, and interfered with the employees' ability to exercise a free, fair, and uncoerced choice in this election, and interfered with the conduct of the election and the election result.
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> **Objection No. 6:** During the critical period, the Union and its representatives, agents and supporters engaged in additional improper or objectionable conduct that interfered with this election or rendered a free and fair election impossible.

(GC Ex. 1(x) at pp. 6-7.)

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B. THE HEARING AND DECISION.

On July 27-31 and August 5-7, 2015, an evidentiary hearing was held before ALJ Eleanor Laws. After the hearing on the unfair labor practices, objections, and briefing by the parties, on November 5, 2015, Judge Laws issued her Decision. In regards to the unfair labor practice allegations, the ALJ found that: Respondent violated Section 8(a)(1) of the Act when Paul Styers, Manager of the ULX facility,[2] and Rick Lincon, Personnel Supervisor, prohibited Mr. Placencia from wearing union insignia; Respondent violated Section 8(1)(a) of the Act when Mr. Styers threatened Mr. Placencia with unspecified reprisals by stating, "you haven't seen nothing yet"; Respondent violated Section 8(a)(1) of the Act when Labor Consultant, Luis Camarena impliedly threatened Mr. Placencia with physical harm because he supported the Union; Respondent violated Section 8(a)(3) and (1) of the Act when it suspended and terminated Mr. Romero; Respondent violated Section 8(a)(3) and (1) of the act by filing criminal charges against Placencia resulting in his arrest, and suspending and terminating him because of his Union activities.

The ALJ ordered Respondent to cease and desist from the actions determined to be unfair labor practices and ordered notice posting. She also ordered reinstatement of Mr. Placencia and Mr. Romero and ordered Respondent to make them whole for any loss of earnings and other benefits caused by their discriminatory terminations. (Decision 40:1-24.)

As set forth fully below, the ALJ also overruled all of the Company's objections. This Decision should be affirmed in its entirety.

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[2] The Los Angeles facility of Con-Way is referred to as ULX. (Tr. 47:11-21.)

C. THE ALJ CORRECTLY FOUND THAT SEVERAL OF THE COMPANY'S OBJECTIONS COMPLETELY LACKED EVIDENTIARY SUPPORT.

The objectionable conduct alleged by the Company consisted of: (1) dissemination of Mr. Placencia's knifepoint threat to Mr. Camarena; (2) receipt of silent calls by a unit employee who opposed the Union on his personal cell phone; (3) employees, including Mr. Placencia, forming an intimidating gauntlet outside the entrance to Con-Way's facilities during the evening polling session; (4) Mr. Placencia contacting unit employees at home during the last few days before the election; (5) Mr. Styers' receipt of a threatening text message on his cell phone, about which unit employees became aware; (6) receipt of a threatening text message by a unit employee; (7) employees circulating comments about employees' cars at Con-Way's Laredo, Texas facility being scratched before the NLRB election there on September 12, 2014; and (8) the Union posting objectionable message on its "Change Con-Way to Win" blog.

The ALJ correctly found that the objection based upon employees forming a gauntlet was withdrawn at the hearing. (Decision 35, fn. 52; Tr. 926:8-9.) She likewise correctly determined that the Company failed to present *any* evidence of the following objections: (1) Mr. Placencia contacting unit employees at their homes during the last few days before the election; (2) Mr. Styers' receipt of a threatening text message on his cell phone, about which unit employees became aware; and (3) Employees circulating comments about employees' cars at Con-Way's Laredo, Texas facility being scratched before the NLRB election there on September 12, 2014. (Decision 36:9-16.) Respondent's Brief does not dispute this. Accordingly, these objections were correctly overruled and should not be disturbed on appeal.

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III. LEGAL STANDARDS

A. THE BOARD MUST GIVE DEFERENCE TO THE ALJ'S CREDIBILITY DETERMINATIONS.

The Company is correct in its assertion that the Board reviews the ALJ's decision *de novo*. Nevertheless, it is well settled that an ALJ's decision is entitled to deference and great weight. The ALJ's findings are particularly important where, as here, the credibility of witnesses plays a key component of the findings:

> Weight is given to the administrative law judge's determinations of credibility for the obvious reason that he or she 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records' . . . We simply observe that the special deference deservedly afforded the administrative law judge's factual determinations based on testimonial inferences will weigh heavily in our review of a contrary finding by the Board. In our view, this position is mandated by the Supreme Court's instruction that 'the significance of [the administrative law judge's] report, of course, depends largely on the importance of credibility in the particular case.

Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078 (9th Cir. 1977); *see also NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962).

B. THE OBJECTING PARTY BEARS A "HEAVY" BURDEN OF PROOF REGARDING ITS OBJECTIONS.

As the objecting party, the Company bears the burden of proof regarding its objections. The Board has frequently held that representation elections are not to be set aside lightly. *See Quest International*, 338 NLRB 856, 857 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002). "[T]he burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Id.* at 525 (quoting *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989)). The objecting party must show that the alleged objectionable conduct affected employees in the voting unit:

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> We consider the Board's rulings on Objections 1, 2, 4 and 5, recognizing that the burden was upon the objecting employer to prove that there had been prejudicial unfairness in the election, a heavy burden which can only be discharged by showing that unlawful acts occurred that interfered with the employees' exercise of free choice to the extent that they materially affected the results of the election.

NLRB v. Claxton Poultry Co., 581 F.2d 1133, 1135 (5th Cir. 1978) (citing *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26 (5th Cir. 1969)).

Significantly, the percentage of eligible voters who actually vote in an election can indicate whether voters were disenfranchised by the alleged objectionable conduct. *See NLRB v. Monark Boat Co.*, 713 F.2d 355, 359 (8th Cir. 1983) ("[t]he fact that 33 out of approximately 185 eligible voters did not vote - more than enough to affect the outcome - at least suggests the possibility that many workers were afraid to vote"); *see also Eliason v. NLRB*, 688 F.2d 22, 23 (6th Cir. 1982). This is highly relevant in this case as ***every single eligible voter cast a ballot in this election***. (GC Ex. 1(ab) at p. 3.)

IV. THE ALJ'S DECISION WAS CORRECT AND SHOULD BE AFFIRMED

A. AFTER WEIGHING THE EVIDENCE, INCLUDING THE CREDIBILITY OF THE WITNESSES, THE ALJ CORRECTLY DETERMINED THAT MR. PLACENCIA DID NOT THREATEN MR. CAMARENA WITH A KNIFE.

The allegations regarding Mr. Placencia brandishing a knife towards Mr. Camarena formed the basis of not only Mr. Placencia's 8(a)(3) and 8(a)(1) causes of action, but also some of the Company's objections to the election. Several witnesses testified to these events and the ALJ's decision largely relies upon the fact that the Company's witnesses simply were not credible and their version of events inconsistent; whereas the witnesses supporting Mr. Placencia's version were credible, factually similar, and easily reconcilable.

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B. MR. PLACENCIA'S VERSION OF EVENTS THAT OCCURRED ON OCTOBER 7, 2014.

On a typical workday, drivers go to the break room of the ULX facility to check in at the dispatch window where Steve Roman, the Company's Freight Operations Supervisor, and driver/dispatcher Salvador Navarro work. (Tr. 165:21-166:7; 210:1-4; 650:8-14; *see generally*, Resp. Ex. 9.) Mr. Roman and Mr. Navarro distribute the delivery routes to the drivers in the morning. The dispatch office of the ULX facility is attached to the break room. There are windows between the dispatch office and the break room. (*See generally*, Resp. Ex. 9; Tr. 1125:18-20.) Once the drivers have obtained their dispatch instructions, they typically go to their trucks on the dock, get them ready for the day, and then proceed to their delivery routes. (Tr. 165:21-166:7.)

On October 7, 2014, drivers were in the break room preparing for their day and obtaining their route assignments from the dispatchers. At approximately 10:30 a.m., Mr. Placencia arrived at work and saw Mr. Cabrera at the break room. (Tr. 209:10-25; 523:23-524:2.) Drivers Elvis Martinez, Jermain Salone, and Hector Sanchez were also in the break room during this time. (Tr. 213:16-20; 523:15-16; 640:8-21.) Mr. Roman and Mr. Navarro were in the dispatch area. (Tr. 213:11-15; 523:19-20.) Mr. Navarro remained in the dispatch area during the entire interaction between Mr. Camarena and Mr. Placencia. (Tr. 225:13-24, 614:19-23.)

Mr. Placencia had a small backpack and he began emptying it onto the table in the break room closest to the dispatch office. (Tr. 210:10-211:4; 524:4-6.) Some of the items being emptied onto the table were a flashlight and a knife – both of which are items drivers typically use for work.[3] (Tr. 212:3-8; 528:21-23; 534:15-16; 645:14-18.) Mr. Cabrera was joking around

[3] In fact, the Company has given knives as rewards to its employees. (Tr. 648:3-6.)

with Mr. Placencia about how many items could fit in such a small backpack. (Tr. 214:10-14; 589:9-11.)

During this time, labor consultant Luis Camarena came into the dispatch office and asked what the employees were laughing about. (Tr. 214:15-23.) Instead of answering his question, Mr. Cabrera and Mr. Placencia spoke with Mr. Camarena and quibbled over Mr. Camarena going on a ride-along with them. (Tr. 217:17-218:9.) Mr. Cabrera suggested that Mr. Camarena go on a ride-along with him because Mr. Cabrera's routes were in Malibu and there were "girls" on his route. (Tr. 217:24-218:1; 527:13-20; 639:19-25; Charging Party Exs. 1-3.) Mr. Placencia suggested that Mr. Camarena ride with him because his routes were in Beverly Hills and they could see celebrities. (Tr. 218:2-9; 527:13-20.)

As Mr. Placencia and Mr. Cabrera joked with each other, Mr. Placencia was arranging his work items in his pockets and putting on his belt clip and computer pouch. (Tr. 219:22-220:2.) He had his flashlight and knife in his hand. (*Id.*; Tr. 528:6-15.) Both the flashlight and the knife were black and about four to five inches long. (Tr. 220:14-21.) The knife was not in an open position, nor did Mr. Placencia ever open it. (Tr. 222:20-23; 529:23-24; 644:18-25; Charging Party Exs. 1, 3.) Several employees testified that during this conversation, everyone who was present was laughing and joking around. (Tr. 214:10-17; 218:10-17; 529:10-22; 639:19-25; 649:2-6; Charging Party Exs. 1-3.)

While Messrs. Placencia, Cabrera, and Camarena were speaking, Mr. Camarena pointed to Mr. Placencia's knife and stated, "That's not a knife, this is a knife" – in reference to the movie *Crocodile Dundee*. (Tr. 220:10-13; 527:23-528:5; 642:7-17.) While making this statement, Mr. Camarena made a gesture of reaching into his back pocket and raised his hand into the air (as if to have a pretend knife in his hand). (Tr. 220:17-222:3; 527:23-528:5; 643:4-13.) In response, Mr. Placencia stated, "[t]hat's a machete" – the following line in the movie.

(Tr. 222:4-5; 529:10-15; 643:22-24.) Mr. Placencia also said, "That looks like a scene from *Crocodile Dundee*." (Tr. 222:6-8; 529:10-17; 642:4-17.) Everyone who was present, including Messrs. Cabrera, Martinez, Placencia, Navarro, Salone, and Camarena, was laughing. (Tr. 222:6-11; 529:18-22; 639:19-640:7.)

After Mr. Camarena's *Crocodile Dundee* reference, Mr. Navarro saw Mr. Camarena approach Mr. Roman while all three of them were still in the dispatch area. Mr. Camarena asked Mr. Roman if he could speak to him and then the two left the dispatch area. Mr. Camarena did not seem upset or emotional. (Tr. 654:13-21.)

After that, Mr. Navarro came out from the dispatch office and walked into the break room and gave Mr. Cabrera and Mr. Placencia their safety meeting. (Tr. 225:25-226:4; 531:2-4; 649:7-14.) Shortly thereafter, Mr. Navarro saw Messrs. Styers, Lincon, and Camarena in Mr. Styers' office acting in a secretive manner. (Tr. 680:12-681:4.)

When the safety meeting concluded, Mr. Cabrera and Mr. Placencia walked out to the dock together and went to their respective trucks. (Tr. 226:13-22; 531:2-12.) When they arrived at their trucks, Mr. Placencia had delivery items that needed to be loaded into his truck. (Tr. 226:18-22.) To do this, he had to use his knife to break down the items and use a pallet jack or hand trolley to get the items into the truck. (Tr. 228:5-11; 533:22-534:4.) Mr. Placencia testified that he spoke to Robert Salas, the Company's Freight Operations Supervisor, regarding the items, as he was having difficulty fitting some of the items into his truck. (Tr. 228:14-229:8.) Mr. Cabrera also recalled having a conversation with Mr. Salas and Mr. Placencia on the dock that morning. (Tr. 532:15-533:4.) Once Mr. Placencia prepared his deliveries and truck, he departed the facility and went on his delivery route. (Tr. 229:17-22.)

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C. RESPONDENT'S VERSION OF EVENTS THAT OCCURRED ON OCTOBER 7, 2014.

According to Mr. Camarena, he went to the dispatch office at around 10:15 a.m. (Tr. 806:12-807:6.) There, Mr. Camarena spoke to Mr. Roman regarding going on "ride alongs" with employees. (Tr. 808:6-23.) At approximately 10:30 a.m., Mr. Placencia approached Mr. Camarena on the break room side of the dispatch counter. (Tr. 808:24-809:5.) Mr. Camarena told Mr. Placencia that he was going to do some "ride alongs." (Tr. 810:7-14.) Mr. Placencia asked Mr. Camarena twice to ride with him; however Mr. Camarena told him no. (Tr. 810:15-811:9.) Mr. Placencia then pulled his knife out of his pocket and exposed the blade to Mr. Camarena. (Tr. 811:16-23.) Looking at the knife, then to Mr. Camarena, he asked if Mr. Camarena was scared. (Tr. 812:6-9; 891:10-13.) According to Mr. Camarena, this occurred for approximately 30 seconds. (Tr. 891:14-16.) Mr. Camarena testified that he had a nervous reaction to Mr. Placencia and acted out a scene from *Crocodile Dundee* by pretending to pull a knife out from behind him and stated, "that's not a knife, this is a knife." (Tr. 812:21-25; 813:13-22.) Mr. Placencia then left. (Tr. 815:11-14.)

After Mr. Placencia departed, Mr. Camarena spoke with Mr. Roman regarding the incident. (Tr. 817:14-23; 820:13-24.) Mr. Camarena informed Mr. Roman that he was going to draft a statement of what had occurred and asked Mr. Roman to do the same. (Tr. 820:25-821:2.) Mr. Camarena also spoke to Mr. Lincon and Mr. Styers. (Tr. 821:9-822:22.) Mr. Styers contacted Human Resources Generalist Kimball Hinds who informed the Director of Human Resources, Kevin Huner, of the incident. (Tr. 1482:15-19.) Mr. Hinds was told to conduct an investigation. (Tr. 1483:8-14.) To this end, Mr. Hinds instructed Mr. Styers to get written statements from Messrs. Roman, Camarena, and Placencia. (Tr. 1264:23-1265:9.)

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Mr. Camarena went to the basement training room and drafted a witness statement. (Resp. Ex. 5, Tr. 830:25-831:7.) Mr. Camarena also ate lunch. (Tr. 832:19-833:1; 862:13-863:2.) At around 2:30 p.m., Mr. Lincon drove Mr. Camarena to the police station. (Tr. 834:14-835:2.) Mr. Camarena met with Police Officer Bell and filed a report. (Tr. 835:22-836:16.) After completing the report, Mr. Lincon and Mr. Camarena returned to the ULX terminal. (Tr. 846:13-18.) Mr. Camarena left the facility at approximately 4:00 p.m. (Tr. 846:19-847:11; 1272:8-25.)

Mr. Styers intended to obtain a written statement from Mr. Placencia and then placed him "out of service." (Tr. 1274:16-20.) Concerned about Mr. Placencia's behavior, Mr. Styers called the police to have them present at the facility upon Mr. Placencia's return. (Tr. 1274:21-1275:13.) Around 5:00 p.m., Mr. Roman called Mr. Placencia and told him that he needed to return to the ULX facility. (Tr. 230:4-16.) Mr. Placencia began heading back. (Tr. 231:6-19.) Mr. Styers called the police department and informed them that Mr. Placencia would be back to the facility at approximately 5:30 p.m. (Tr. 1278:3-7.)

Officer Mario Lagac and his partner, Officer Flores, responded to the call and reported to the ULX facility. (Tr. 376:15-378:2.) Mr. Styers told the officers that two of his employees had engaged in a "verbal argument." (Tr. 378:15-23.) Mr. Styers provided a copy of the police report filed by Mr. Camarena to the officers and informed them that he wanted them to be witnesses to when Mr. Styers suspended Mr. Placencia. (Tr. 379:1-4.) The officers asked if the victim was still at the facility. (Tr. 405:9-12; 1279:17-21.) Mr. Styers told the officers that Mr. Camarena was no longer at the facility and unavailable. (Tr. 405:17-22; 1279:17-21.)

Mr. Styers and the officers tracked Mr. Placencia's return via GPS. (Tr. 1280:7-1281:5.) Mr. Placencia stopped at a shopping center close to the ULX facility. (Tr. 1282:7-20.) The officers left the ULX facility to arrest Mr. Placencia. (Tr. 1283:2-9.) Mr. Styers and Mr. Lincon

followed the officers in order to obtain Mr. Placencia's delivery truck. (Tr. 1283:25-1284:23.)

At approximately 6:00 p.m., Mr. Placencia stopped to take his lunch break in the parking lot of an El Pollo Loco restaurant located about two miles from the Los Angeles facility. (Tr. 231:20-232:10.) A police car approached Mr. Placencia in his delivery truck. One of the officers told Mr. Placencia to exit his vehicle, asked him if he had any weapons, and proceeded to arrest Mr. Placencia. (Tr. 233:17-235:18.) Mr. Placencia was very confused and asked the officers what was occurring. (Tr. 237:7-25.) He was informed that the Company was pressing charges against him. (*Id.*) Mr. Placencia spent one night in jail and was released the following day on bail. (Tr. 243:14-244:19.) The charge against Mr. Placencia was first reduced from a felony to a misdemeanor and then dismissed entirely. (Tr. 262:22-264:11.)[4]

D. CREDIBLE WITNESSES SUPPORTED MR. PLACENCIA'S VERSION OF THE OCTOBER 7, 2014 EVENTS.

Messrs. Placencia, Navarro, and Cabrera all testified to the facts set forth in Section IV(B) of this brief. The ALJ determined that their testimony was consistent and each one was credible. Specifically, the ALJ determined that Mr. Cabrera was a very credible witness. She found Mr. Cabrera to be resolute in his position that there was foul play in connection with the incident. (Decision 30:30-35.) She likewise determined that Mr. Navarro was credible. (*Id.*)

Contrary to the Company's assertions, the ALJ correctly found that where an employee testifies against their current employer, that employee's testimony should be afforded a significant amount of weight: The testimony of current employees that is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . .

[4] After his arrest, the Company terminated Mr. Placencia. These false allegations against Mr. Placencia formed the basis of his unfair labor practice charge. As noted above, the ALJ determined that the allegations lacked merit and ordered Mr. Placencia's reinstatement.

and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505, fn. 22 (1977). In footnote 33 of Respondent's Brief, it incorrectly asserts that testimony provided against one's employer is *not* given at any risk and advocates that this principle is based on a "faulty premise." The Company offers absolutely no support for this assertion and makes no attempt to provide a valid reason to overturn decades of consistent case law. Here, both Mr. Cabrera and Mr. Navarro are current employees and the ALJ correctly weighed the employees' testimony.

After Mr. Placencia was arrested, he asked three of his co-workers to draft witness statements regarding what they recall happening. Messrs. Martinez, Navarro, and Cabrera each drafted a witness statement and provided it to Mr. Placencia. (Charging Party Exs. 1-3.) Mr. Placencia also drafted a witness statement. (Tr. 253:2-3; GC Ex. 6.) All four of the witness statements were also provided to the Company. (Tr. 253:18-20; 664:5-8; 1491:21-1492:3.) All of the witness statements are consistent and match the facts set forth above. Each employee recalled the references made to *Crocodile Dundee*. Each also remembered that the atmosphere in the break room was jovial and that the employees and Mr. Camarena were joking around. Likewise, Mr. Cabrera's witness statement (and testimony) explains that he was with Mr. Placencia the entire morning – from when they entered the break room to when they went to the dock and loaded their trucks. (Tr. 531:2-4.)

Contrary to the Company's conclusion, it presented no evidence of corroboration between the witnesses.[5] (Tr. 251:1-5; 545:9-10; 550:16-551:11; 662:17-663:3.)

As noted by the ALJ, at the hearing, Mr. Huner referred to dishonesty as being a "cardinal sin" at the Company. (Tr. 1471:18-23.) He testified that Messrs. Martinez, Cabrera, and

[5] Mr. Martinez did not testify at the hearing.

Navarro had all been dishonest in their witness statements provided to the Company. (Tr. 1548:9-13.) In spite of this, none of the employees was disciplined for their witness statements. (Tr. 1548:16-17.) It seems that if dishonesty was such a great sin as Mr. Huner said, the submission of a false statement regarding such a serious matter would have led to at least some disciplinary action against the employees.

Furthermore, the Company actually concluded that it *did* believe the employees' witness statements to a certain extent. In the Company's investigative summary, Mr. Huner concluded that the conversation the morning of October 7, 2014 began with "lighthearted banter." (Tr. 1547:3-16; Resp. Ex. 30.) Mr. Camarena testified that he did not know why Mr. Huner would make that conclusion. (Tr. 918:11-25.) Mr. Roman also testified that he did not recall any lighthearted conversation occurring that morning. (Tr. 1216:4-8.) Accordingly, Mr. Huner must have believed the employees to this extent; however, he chose to only believe certain portions of the witness statements. This makes little sense.

Mr. Huner further testified that he credited Mr. Roman's version of events because he had known him Mr. Roman for several years and believed him to be honest. (Tr. 1554:12-1555:3.) To do this, however, Mr. Huner had to reject the four completely consistent statements provided by the other employees. Further, the Company had Mr. Hinds make several revisions to his "final" report and even asked Mr. Roman to revise his witness statement. All of this establishes that the Company inappropriately manipulated the evidence presented to it in an attempt to establish its case against Mr. Placencia.

Contrary to the Company's evidence, the Union's evidence regarding the knife incident was consistent, credible, and conclusively established that Mr. Placencia never threatened Mr. Camarena with a knife. The ALJ's determination that Mr. Placencia did not threaten Mr. Camarena with a knife is correct and should not be overturned.

E. THE ALJ CORRECTLY CONCLUDED THAT THE COMPANY'S ONLY WITNESSES TO THE ALLEGED KNIFE INCIDENT WERE NOT CREDIBLE.

1. The ALJ Correctly Determined that Mr. Camarena was Evasive and Not Credible.

As noted above, the ALJ stressed that her conclusion regarding the knife incident largely rests on her perception of the credibility of the witnesses. Significantly, the ALJ concluded that Mr. Camarena, who was obviously the Company's key witness to the alleged knife incident, was evasive, inconsistent, and overall lacked credibility. (Decision 24:3-7.) The ALJ highlighted two parts of Mr. Camarena's testimony to demonstrate his evasiveness. Mr. Camarena had to be pushed to admit that the goal of his job as a labor consultant was to keep unions out of companies. (Decision 24:9-38.) He likewise also answered "No" when asked whether he got a sense of which employees were pro-union or anti-union. But when pressed, he admitted that he did, in fact, rate employees on whether they were pro- or anti-union. (Decision 25:1-45.)

The ALJ also determined that Mr. Camarena had a tendency to exaggerate. She determined that Mr. Camarena attempted to portray Mr. Placencia as mentally unstable. However, the Company provided no evidence of this. In fact, the Company attempted to show Mr. Placencia's alleged uneven disposition by having Mr. Rosado testify regarding a conversation between Mr. Placencia and Mr. Camarena that took place on October 6, 2014. Mr. Rosado, whom the ALJ described as credible and neutral, described Mr. Placencia as a little "emotional," but professional. (Tr. 1108:12-19.)

The ALJ also simply did not believe Mr. Camarena's version of the story regarding the knife incident, and for good reason. Mr. Camarena's description of the incident and his actions following it were absurd. Likewise, his testimony wholly contradicted his witness statement provided to the Company.

Mr. Camarena's witness statement asserts that he was "threatened at knife point." (Resp. Ex. 18.) However, when testifying at the hearing, Mr. Camarena explained that Mr. Placencia was approximately six feet away from him. (Tr. 863:18-21.) Mr. Placencia was also on the opposite side of the dispatch counter from Mr. Camarena – Mr. Placencia was in the break room while Mr. Camarena was in the attached dispatch office. (Tr. 810:2-6.) The dispatch office is physically separated by a counter and a window from the break room area (where Mr. Placencia was standing).[6] (Tr. 1125:18-1126:2; *see* Resp. Ex. 9D.) The dispatch window counter is two feet wide on both sides of the window for a total of four feet. (Tr. 1125:21-1126:2.) The dispatch window's counter is approximately four feet tall. (Tr. 1125:15-17.) Given the proximity between Mr. Placencia and Mr. Camarena, this hardly shows that Mr. Camarena was threatened at "knife point."

Mr. Camarena also testified that Mr. Placencia asked him, "What, are you scared?" twice. (Tr. 812:6-13.) However, his witness statement only asserts that Mr. Placencia made this statement once. (Resp. Ex. 18.) Mr. Camarena further testified that he was very "surprised" when Mr. Placencia brandished the knife; however, his written statement asserts that Mr. Placencia's actions came "as no surprise." (Tr. 893:5-7; Resp. Ex. 18.) In spite of the fact that Mr. Camarena testified that he attempted to be thorough and accurate in his statement provided to the Company, and that this was the very first thing that Mr. Camarena did after the incident, his testimony varied greatly from what was written in the statement. (Tr. 864:14-16.) He likewise included irrelevant information regarding an employee whose car's windshield had been broken. (Resp. Ex. 18.) As set forth below, Mr. Camarena did *not* mention the *Crocodile*

[6] In October 2014, the bottom windows between the break room and the dispatch office that can be seen on Respondent Ex. 9D were present; however, since that date, the Company added the top sliding portion of the windows. (Tr. 1211:3-1212:1.)

Dundee reference in his witness statement so the inclusion of this admittedly irrelevant information regarding the windshield tends to show that his statement and version of the facts was untrue.

Moreover, Mr. Camarena's actions after the incident are not credible, as they do not reflect the actions of a person who was afraid for his life. It is undisputed that Mr. Camarena's police report was filled out at approximately 3:45 p.m. on the day of the incident, even though the incident allegedly occurred around 10:30 a.m. (Tr. 842:4-8; GC Ex. 8; Resp. Ex. 6.) Mr. Camarena maintained that he saw his life and his wife and children "flash before [his] eyes." (Tr. 812:1-5.) In spite of this, the first thing that Mr. Camarena thought to do was to prepare a witness statement and ask Mr. Roman to also prepare one. (Tr. 820:25-821:2.) Mr. Camarena also ate lunch, spoke with Mr. Styers and Rick Lincon about the incident, called his wife, and called Lupe Cruz, the CEO of his employer Cruz & Associates. (Tr. 821:3-20; 822:5-15; 822:25-823:13.) After all of this, he was finally driven to the police station. (Tr. 821:3-20; 822:5-15; 822:23-823:13.) As the ALJ determined, neither the Company nor Mr. Camarena offered any valid reason why Mr. Placencia waited so long to go to the police. (Decision 31:40-45.) Mr. Camarena also testified that during this time, he had no knowledge as to Mr. Placencia's whereabouts. (Tr. 863:8-13.) Mr. Camarena admitted that he could have gone to the police immediately after the incident with Mr. Placencia or called 911, but he did not. He could not explain why he failed to take immediate action. (Tr. 884:3-14.) Mr. Camarena did not call the police immediately after the incident or seek to have Mr. Placencia taken off the street. If someone's life was truly threatened, it would seem that the *first* action they would take is to contact the police. This is particularly true where, as here, the victim does not know the whereabouts of the attacker. It is not believable that this was essentially the *last* action Mr. Camarena took that day.

Mr. Camarena likewise did not follow up with the police at all regarding the incident after he filed his police report. (Tr. 848:15-17; 856:12-14; 858:13-16.) Furthermore, he notified the Company that he had planned to file a restraining order against Mr. Placencia, but then was told by a non-attorney friend that he could not file for a restraining order. (Tr. 869:8-871:5.) None of these actions are consistent with someone whose life was truly threatened.

Finally, Mr. Camarena also gave an interview with Kimball Hinds, the Company's Human Resources Manager, and Mr. Hinds summarized the conversation. (Resp. Ex. 27.) In that statement, Mr. Camarena asserted that when Mr. Placencia walked into the break room on the morning of October 7, 2014, he gave Mr. Camarena "a look" and stated sarcastically, "Hi Luis." (*Id.*) During his testimony, Mr. Camarena did not mention this at all, but instead testified that Mr. Placencia merely stated "What's up?" and "Good morning" to him. (Tr. 810:7-11.) He did not testify that Mr. Placencia was rude or sarcastic to him prior to the knife incident.

The ALJ correctly discredited Mr. Camarena's testimony. His actions, testimony, and witness statements were contradictory and failed to prove the Company's allegations.

2. The ALJ Correctly Discredited Mr. Roman's Testimony.

The ALJ also correctly discredited Mr. Roman's account of the knife incident. On the day of the incident, Mr. Roman drafted a witness statement. He asserted that Mr. Placencia's alleged action of pointing the knife at Mr. Camarena was "not done in a friendly manner." (Resp. Ex. 10.) As concluded by the ALJ, there would be no reason to write this unless Mr. Placencia's actions were arguably done in jest. (Decision 31:6-8.) Both Mr. Roman and Mr. Camarena testified that Mr. Placencia certainly was not joking when he pointed the knife at Mr. Camarena, and it was Messrs. Placencia, Cabrera, Navarro, and Martinez who asserted that Mr. Camarena was joking around with Mr. Placencia. However, the Company did not have any information that Mr. Placencia was going to claim that he and Mr. Camarena were joking around

until the day after the incident. Accordingly, as the ALJ concluded, it was irrational that Mr. Roman would need to dispel the notion that Mr. Placencia's actions were done in a joking manner on the day of the incident.

Further, after the incident, Mr. Roman was asked by Kevin Huner, "Did Juan [Placencia] point the knife at Luis? Can you describe that part of the interaction?" (Resp. Ex. 12.) Mr. Roman responded, "No he did not point the knife at him." (*Id.*) This is in direct contradiction to Mr. Camarena's testimony and witness statement.[7] This also contradicts Mr. Roman's *own* testimony, as he stated that Mr. Placencia pointed the knife at Mr. Camarena. (Tr. 1148:13-17.) This significant discrepancy was correctly noted by the ALJ. (Decision 31:9-13.)

The ALJ also discredited Mr. Roman's testimony that Mr. Navarro was not in the dispatcher's office when the incident occurred. (Decision 31:15-26.) As noted above, this was directly contradicted by Mr. Navarro's testimony, which the ALJ found highly believable. Likewise, there was no dispute that Mr. Navarro works in the dispatcher's office and provides drivers their paperwork in the mornings, and the Company had no explanation of Mr. Navarro's alleged absence from the dispatcher's office.

Contrary to the Company's assertion that the discrepancies were minimal, the significant contradictions between Mr. Roman's and Mr. Camarena's statements cannot be overlooked.

The witnesses' description of how Mr. Placencia allegedly brandished the knife is also dissimilar. This description further varies in both Mr. Camarena's and Mr. Roman's written witness statements. For instance, Mr. Camarena testified that Mr. Placencia flipped the knife

[7] Mr. Roman's purported explanation of his answer to Mr. Huner's question is not credible. While Mr. Huner's question was clear, Mr. Roman asserted that he understood it to mean whether Mr. Placencia had a bend in his elbow when pointing the knife at Mr. Camarena. (Tr. 1184:14-1185:18.) Mr. Huner's question was *not* "How was Mr. Placencia holding the knife?" or "Was Mr. Placencia's arm straight or bent?" Instead, it was a straight-forward question of whether the knife was pointing at Mr. Camarena. Mr. Roman's interpretation of Mr. Huner's question was not credible.

open once and asked him if he was scared. (Tr. 906:9-11.) He further testified that Mr. Placencia pulled the knife out of his pocket and raised it to below his chest/ribcage level. (Tr. 868:20-23.) After that, Mr. Placencia put the knife away and walked away. (Tr. 815:11-14.) On the other hand, Mr. Roman testified that Mr. Placencia pulled the knife out of his pocket while it was closed and held it in his hand with his elbow on the dispatch counter. (Tr. 1147:3-1148:8.) The knife remained in his hand with his elbow on the dispatch counter while Mr. Placencia popped it open twice. (Tr. 1148:20-25.) Mr. Roman testified that Mr. Placencia clicked open the knife, shut it, and popped it open again. (Tr. 1149:6-11.) He further explained that when Mr. Placencia opened the knife, it was at approximately the level of his chin. (Tr. 1220:24-1221:6.)

The differences between these witnesses' testimony and recollections are drastic and the Company failed to address these discrepancies in its brief. The witnesses deviate as to how many times Mr. Placencia clicked open the knife – an important detail of the incident. Another significant difference is where, allegedly, Mr. Placencia held the knife and how he held it. Mr. Roman recalled that Mr. Placencia's elbow was on the counter and that the knife was at approximately chin level, while Mr. Camarena recalled the knife being near Mr. Placencia's chest. These two accounts vary greatly and do not reflect the recollections of two people who actually witnessed the same event.

The Company incorrectly asserts that Mr. Camarena and Mr. Roman heard Mr. Placencia say something "slightly different" when Mr. Placencia opened the knife. (Resp. Brief, p. 25.) According to Mr. Roman, when Mr. Placencia clicked open the knife, he stated, "You don't have to be afraid. Nothing's going to happen." (Tr. 1148:20-1149:11.) Mr. Roman testified that Mr. Placencia made the statement twice. (*Id.*) Mr. Roman testified that he did *not* hear Mr. Placencia ask, "What are you, scared?" (Tr. 1205:8-11.) The Company further failed to address that the witness statements provided by Mr. Roman and Mr. Camarena illustrate even *more*

inconsistencies. According to Mr. Roman's witness statement, Mr. Placencia clicked open the knife twice and also made the statements twice. (Resp. Ex. 17.) Mr. Camarena testified that Mr. Placencia clicked open the knife only once. (Tr. 906:9-11.) Again, these are significant discrepancies in these witnesses' accounts.

The witness statements provided by Mr. Camarena and Mr. Roman further vary as to who walked away first. Mr. Camarena stated that Mr. Placencia walked away, while Mr. Roman stated that Mr. Camarena walked away. (Resp. Exs. 11, 18.)

Moreover, neither Mr. Camarena's nor Mr. Roman's statements make any mention of the *Crocodile Dundee* reference, yet both testified that Mr. Camarena made this statement during the incident. (Tr. 812:23-25; 1151:23-1152:6.) Mr. Camarena disbelievingly explained that had a nervous reaction to Mr. Placencia brandishing the knife and this caused him to make the reference to the 30-year old comedy. When asked why this very distinct piece of information was not included in their witness statements, neither witness had a valid explanation. Mr. Camarena simply stated that he "just did" when asked why this information was omitted. (Tr. 864:17-18.) Mr. Roman stated that there was not a reason as to why he left this information out, but that he did not know what Mr. Camarena was talking about when he made the statement. (Tr. 1208:11-17.) Furthermore, both witnesses testified that the Company never followed up with them regarding whether Mr. Camarena actually made the *Crocodile Dundee* reference. (Tr. 920:19-25; 1218:12-16.) This was in spite of the fact that Messrs. Martinez's, Placencia's, Cabrera's, and Navarro's statements <u>all</u> discuss the *Crocodile Dundee* reference. It is highly suspect that this was never mentioned in the Company's witness statements and that the Company never followed up regarding it.

Given all these variances between Mr. Roman's and Mr. Camarena's testimony, the ALJ correctly determined that the evidence failed to establish that they witnessed the same or even

similar conduct. Given the inaccuracy and inconsistency of the Company's only evidence of this incident, it failed to establish that Mr. Placencia actually threatened Mr. Camarena with a knife.

The Company asserts that given the stressful nature of the incident, it makes sense that Mr. Camarena and Mr. Roman would forget what the Company refers to as minor and immaterial details – such as how many times Mr. Placencia allegedly opened his knife towards Mr. Camarena. As set forth above, these were not miniscule details that were slightly altered by each witness. Instead, this information, which forms the very basis of the allegations, was forgotten by both Mr. Camarena and Mr. Roman in a matter of hours. (Resp. Brief, p. 40.) The discrepancies between the two witness statements are staggering.

In reality, given the allegedly significant events of the day, it would seem that Mr. Camarena and Mr. Roman would be *more* likely to remember. This can be contrasted to the consistent testimony and statements provided by Messrs. Navarro, Cabrera, Martinez, and Placencia himself, who all believed it to be just another ordinary day at work.

For all of the reasons stated above, the ALJ's Decision, based heavily on credibility determinations, is correct in that Mr. Placencia did not pull a knife on Mr. Camarena. Accordingly, the ALJ's decision to overrule the objections based upon this conduct is correct.

F. MR. PLACENCIA WAS NOT AN AGENT OF THE UNION.

1. Agency Standards.

The ALJ did not discuss the issue of whether Mr. Placencia was an agent of the Union because she determined that Mr. Placencia never threatened Mr. Camarena with a knife. As explained above, this conclusion is supported by a preponderance of the evidence. Because Mr. Placencia did not threaten Mr. Camarena with a knife, any gossip concerning this information was not of his making. Likewise, there was no evidence that the Union spread any information regarding the knife incident to employees. The ALJ's decision was well reasoned and supported

by the evidence and should not be disturbed.

In any event, should the Board consider the question of agency, the Company did not meet its burden of proving that *any* employees were agents of the Union. *Mastec Direct TV*, 356 NLRB 809 (2011) ("*Mastec*").

"Generally, a union is not responsible for the acts of an employee, unless the employee is an agent of the union." *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983). The party seeking to prove agency "must show that the union 'instigated, authorized, solicited, ratified, condoned or adopted' the employee's actions or statements." *Id.* (citations omitted); *see also Kux Mfg. Co. v. NLRB*, 890 F.2d at 809. "Apparent authority 'results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question." *Mastec*, *supra*, at 809 (quoting *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122 (2003)). "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief." *Id*. This requires proof that "the union cloaked the employee with sufficient authority to create a perception among the rank-and-file that the employee acts on behalf of the union, and that the union did not disavow or repudiate the employee's statements or actions." *Kitchen Fresh, Inc.*, *supra*, at 355 (citations omitted); *NLRB v. Sliman's Sales & Servs.*, 75 Fed. Appx. 457, 466 (6th Cir. 2003).

The fact that an employee solicited union authorization cards, actively participated in organizing, or was otherwise visible in a union campaign does not establish agency status. *Corner Furniture Discount Center, Inc., supra*. Agency is likewise not established merely on the basis that employees are engaged in "vocal and active union support." *United Builders Supply Co., Inc.*, 287 NLRB 1364, 1365 (1988); *see also Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983).

The Company presented very little evidence of agency with respect to its employees and the Union. The only evidence elicited at the hearing regarding Mr. Placencia's agency status was that he was a member of the organizing committee and that he collected five to six Union authorization cards. (Tr. 178:23-179:12; 1583:12-13.) The Union did not even provide authorization cards directly to Mr. Placencia. (Tr. 1595:4-9.) Further, as the Company admits, Mr. Placencia did not make any house calls. (Tr. 352:11-14.)

Mr. Placencia supported the Union's organizing efforts; however, his level of involvement did not make him an agent of the Union. He was never held out by the Union to other employees in this way, he was not paid by the Union for his efforts, he did not lead meetings on behalf of the Union, and generally, he did not have the apparent authority to act on behalf of the Union. (Tr. 354:17-21; 1575:22-25; 1586:11-14.) Overall, the Company failed to establish that Mr. Placencia was an agent of the Union.

Respondent focuses solely on Mr. Placencia's actions and concludes that Mr. Placencia was acting with apparent authority. However, as cited by Respondent and as set forth above, in order to establish apparent authority, it requires an act of the *principal* – in this case, the Union. Indeed, the Company did not address this in its brief because there was no evidence that the Union acted to give any employee authority to act on its behalf. This alone demonstrates that Mr. Placencia was not an agent of the Union, as there was never any act by the Union designating or making him such.

Likewise, all of the cases cited by the Company do not support the Company's arguments. For instance, in *Cornell Forge Co.*, 339 NLRB 733 (2003), the Board actually found that employees identified in a letter from the union to the employer as members of the union's in-plant organizing committee, who wore union insignia during the campaign, and who spoke in favor of the union to other employees were *not* agents of the union. Likewise, in *Bristol Textile*

Co., 277 NLRB 1637 (1986), the alleged agent was the union's conduit to the other employees and was the *only* employee with whom the union vice president dealt. There was also evidence that employees perceived the alleged agent as the union representative. Here, it is undisputed that the Union dealt with several employees other than Mr. Placencia, and that (as set forth below) the Union's labor organizers were actively involved in the campaign, so Mr. Placencia was not the Union's "conduit" to the employees. Further, there was absolutely no testimony elicited regarding how employees perceived Mr. Placencia. Finally, in *Pastoor Bros. Co.*, 223 NLRB 451, 453 (1976), committee members were found to be agents because the union used committee members to solicit authorization cards, employees viewed committee members as the union's in-plant representatives, the union used the committee as its liaison with employees, and members of the committee drafted a handout that was reviewed and approved by the union's legal counsel before distribution to the employees. None of this is even remotely close to what occurred in this case.

2. Louie Diaz and Other Labor Organizers Maintained an Active Role in the Union's Campaign.

Respondent makes no mention of the significant evidence that the Union's labor organizers were actively involved in the campaign from start to finish, which further dispels its argument. *See Cornell Forge Co.*, 339 NLRB at 733 ("in-plant organizers are generally found to be agents on the union *only* when they serve as the **primary conduits for communication between the union and other employees** or are substantially involved in the election campaign **in the absence of union representatives**") (emphases added). Louie Diaz was the Union's lead labor organizer responsible for the Union's campaign. Likewise, several other labor organizers assisted him with the campaign. (Tr. 1575:1-7.) The Con-Way Union campaign was Mr. Diaz's only campaign at the time and it was, essentially, his full-time position. (Tr. 1585:14-20.)

Beginning approximately ten months before giving out authorization cards to the employees, Mr. Diaz began holding meetings with employees of Con-Way. (Tr. 1573:15-23.) He held several meetings (both large and small) with employees of the Company. (Tr. 1572:24-1573:1.) Some of the meetings that he held involved employees from other locations of the Company. (Tr. 1573:9-11.) He estimated that he also held approximately 15 larger meetings with the employees of the ULX terminal. (Tr. 1573:24-1574:2.) These meetings varied in size between 10 and 25 employees. (Tr. 1574:3-11.) Mr. Diaz held an additional ten meetings where the number of attendees was between one and five employees. (Tr. 1575:12-21.) When Mr. Diaz conducted these meetings, he (or the other labor organizers) would stand in front of the audience and lead the meeting. He never asked employees to run the meetings on the Union's behalf. (Tr. 1574:21-1575:7; 1575:22-25.) Nor did he specifically direct employees to hold meetings on their own. (Tr. 1576:22-1577:1.) When Mr. Diaz conducted his meetings, he wore clothing with the Teamsters logo on it, which identified him as a representative of the Union. (Tr. 1575:8-11.)

Furthermore, to the extent that Mr. Diaz dispensed documentation at the meetings, the documents were provided to everyone present. (Tr. 1580:12-15.) Likewise, Mr. Diaz passed out the lanyards depicted in General Counsel Exhibit 10 to anyone who wanted them (as opposed to only passing them out to the employees on the organizing committee). (Tr. 1582:14-24.)

Mr. Diaz and the other labor organizers also provided their contact information to the employees. (Tr. 1576:1-9.) Mr. Diaz provided his cell phone number to the employees so that employees could contact him with any questions. (Tr. 1576:10-15.) Mr. Diaz communicated directly with employees through both phone calls and text messages. (Tr. 1582:25-1583:2.) He also met one-on-one with employees upon their request. (Tr. 1590:3-11.)

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Mr. Diaz and the other labor organizers conducted house calls and collected authorization cards directly from the employees. (Tr. 1583:3-8; 1586:25-1587:1; 1587:21-1588:5.) Mr. Diaz estimated that throughout the campaign he went on approximately 30 house calls. (Tr. 1587:15-20.) While Mr. Romero asserted that he conducted house calls, it was undisputed that the Union did not instruct him to do so. (Tr. 1587:5-11.) By communicating directly with employees and maintaining a high level of campaign-related activity, Mr. Diaz and the other labor organizers were an active presence in this campaign up to the election. *See e.g., NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976) (where union organizers were actively involved in the campaign, this supported finding that no employees were agents of the union).

Accordingly, no employees served as the primary conduit for communication between the Union and other employees of the Company. The Company failed to show that any employees were agents of the Union and the stricter, third party standard (set forth immediately below) must apply to all of the acts alleged.

V. BECAUSE EMPLOYEES WERE NOT AGENTS OF THE UNION, THE ALJ CORRECTLY DETERMINED THAT THE BOARD'S THIRD PARTY CONDUCT STANDARDS APPLY TO ALL OF THE OBJECTIONS ALLEGED

The ALJ correctly determined that the third party standard applied to the allegations regarding the Change Con-Way to Win blog. (Decision 38:23-25.) In fact, the Company failed to establish that the Union was responsible for any of the alleged objectionable conduct and, therefore, the third party conduct standards apply to all of the objections.

The Board's general position is that it will refuse to void an election on the basis of third party conduct that did not create a "general **atmosphere of fear and confusion** which precluded the holding of a free election" (*James Lees and Sons Co.*, 130 NLRB 290, 291 (1961)), or was

not "so aggravated that a free expression of choice of representation is **impossible**." *Beaird-Poulan Division*, 247 NLRB 1365, 1388 (1980) (emphasis added); *see also Hollingsworth Management Service*, 342 NLRB 556, 558 (2004) (Board considers circumstances peculiar to the situation and determines whether the conduct at issue so substantially impaired the employees' free choice as to require that the election be set aside). Acts attributable to third parties are not subject to the same level of scrutiny as acts attributable to the union or to the employer. *NLRB v. L & J Equipment Co.*, 745 F.2d 224, 239 (3d Cir. 1984) (citing *NLRB v. ARA Services*, 717 F.2d 57 (3d Cir. 1983) (en banc)). The misconduct of a third party is given less weight than that of a Union agent in determining whether an election should be set aside because of the inability of unions and employers to prevent misconduct by persons over whom they have no control. *NLRB v. Dickinson Press*, 153 F.3d 282, 288 (6th Cir. 1998). As set forth below, the Company cannot meet this heightened burden to establish that the election should be set aside in this case.

A. EVEN IF THE BOARD FINDS THAT MR. PLACENCIA THREATENED MR. CAMARENA WITH A KNIFE, THE CONDUCT IS INSUFFICIENT TO SET ASIDE THE ELECTION.

Even if the ALJ's finding that Mr. Placencia did not threaten Mr. Camarena with a knife is overturned, the election should still not be set aside based upon this conduct. As set forth above, the ALJ correctly determined that Mr. Placencia was not an agent of the Union. In addition to the above-stated analysis regarding Mr. Placencia's agency status, the agency relationship must also be established with regard to the **specific conduct** that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Cornell Forge Co.*, 309 NLRB at 733. Here, there was absolutely no evidence presented that the Union encouraged or instigated Mr. Placencia's threatening behavior against Mr. Camarena. In fact, the Union directly denied this. (Tr. 1584:19-25.) For these reasons, the third party standard must be applied to these allegations

in determining whether the election should be set aside.

In analyzing whether third party conduct is sufficient to set aside an election,

> the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election.

Westwood Horizons Hotel, 270 NLRB 802, 803 (1984).

A fatal flaw in the Company's arguments is that the alleged threat was not made against any voting employee. Conduct has been found insufficient to set aside an election where there was no evidence of reprisal against eligible voters. *NLRB v. El-Ge Potato Chip Co.*, 427 F.2d 903, 905 (3d Cir. 1970). Here, the *only* allegation and evidence of an alleged threat was againstlabor consultant, Mr. Camarena, who was clearly not a unit employee and the threat did not concern anyone's vote. Additionally, not a single employee testified that the alleged threat concerned the election or even the Union. (Tr. 952:1-3; 980:16-21; 1002:1-5; 1028:22-1029:4; 1052:13-19; 1084:18-25; 1220:7-10.) *See Cal-West Periodicals*, 330 NLRB 599 (2000) (threat not directed at employee's vote was one reason why election not set aside). If the Company's evidence is to be believed, there were no eligible voters present when the threat occurred; nor was there an indication in the record that any employee feared for his or her personal safety because of the incident. *See NLRB v. Maryland Ambulance Servs.*, 192 F.3d 430, 437 (4th Cir. 1999).

Indeed, this is a significant difference between the cases cited by Respondent, *Steak House Meat Co. Inc.*, 206 NLRB 28 (1973) and *Smithers Tire*, 308 NLRB 72 (1992), and this case. In fact, several employees testified that they were neither threatened nor scared of Mr. Placencia after the incident, nor did the incident affect the way they voted in the election. (Tr.

1028:5-1029:4; 1047:15-1048:6; 1083:11-14; 1083:24-1084:17; 1221:17-19.) *See Worley Mills, Inc. v. NLRB*, 685 F.2d 362, 367 (10th Cir. 1982) (noting that no employee who testified was intimidated into changing his vote). In sum, the alleged threats did not affect the election and for this reason alone, they are insufficient for the election to be set aside.

Additionally, the incident occurred two weeks prior to the election and the alleged threat occurred only once. *See Cal-West Periodicals, supra*, at 599 (finding that single conversation that if employee did not vote for the union he could just "wait and see" what would happen to him was insufficient to overturn election); *compare Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000 (3d Cir. 1981) (overturning election where several incidents occurred, including where employees threatened to "kick" the "ass" of any employee who did not vote for the union and where 6'7" Marine made several threats to much smaller employee). After the incident, Mr. Placencia was suspended and terminated and did not return to the ULX facility except to vote. (Tr. 1052:20-23.) Employees testified that they did not see Mr. Placencia again after the incident. (Tr. 1083:15-20; 1091:9-13.) There was, therefore, no evidence that the alleged threat was "rejuvenated" in the time leading up to the election.

If anything, it would seem that this conduct would be more likely to sway voters to vote *against* the Union rather than for it. *NLRB v. Le Fort Enters.*, 791 F.3d 207, 213 (1st Cir. 2015) ("threat would have more likely induced an [] employee to vote against the Union, not for it."); *see also NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 974 (6th Cir. 1975) (incident of damage to anti-union employees' personal automobiles tended to confirm employees' opinion that they did not want the union to win the election).

The ALJ's decision should be affirmed.

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1. To the Extent that the Employees Discussed the Knife Incident, this is Insufficient to Overturn the Election.

Because the ALJ correctly determined that Mr. Placencia did not threaten Mr. Camarena with a knife, she also correctly overruled the Company's objection based upon the dissemination of that information. However, in the event that this decision is overturned, the dissemination of information regarding the knife incident is still insufficient to overturn the election.

The employees who testified were not present during the incident and the alleged dissemination was based upon insufficient (false) rumors and hearsay. Here, *ManorCare of Kingston PA, LLC*, 360 NLRB No. 93 (2014) is illustrative. In that case, an employee stated that she was going to start punching people in the face if the union did not get in and another employee stated that she would do damage to people's cars and cause bodily harm against employees who voted against the Union. *Id.* These statements were "disseminated by other employees not in the presence of the speakers who actually made the comments" and "further, repeated to employees who did not have the benefit of hearing them and evaluating them personally." *Id.* Finding that "the Board has been reluctant to set aside an election where employees circulate third-party statements that have been stripped of their original context," the Board determined that the objection could not be sustained "on what was essentially a version of the 'game of telephone.'" *Id.*; *see also Central Photocolor Co., Inc.*, 195 NLRB 839 (1972) (objections overruled where third party "threats and communication of rumors of misconduct and predictions of Union pressure did not create a general atmosphere of fear and reprisal").

Here, according to the Company, not a single voting employee was present during the alleged incident between Mr. Camarena and Mr. Placencia. To the extent that employees found out about Mr. Placencia's alleged conduct, such discussions were repeated information amounting to mere rumors. Indeed, employees' testimony was illustrative of how such third

party hearsay and rumors became twisted when discussed amongst the employees. For instance, Mr. Loya testified that he actually heard two different stories regarding the incident – one being that Mr. Placencia opened a jacket he was wearing to Mr. Camarena and his knife was in there. (Tr. 1014:1-13.) As another example, Mr. Lopez testified that Mr. Camarena used some kind of "trickery" to get Mr. Placencia to expose the knife to him. (Tr. 941:20-942:4.) Finally, Mr. Cruz testified that he heard that Mr. Placencia was not actually threatening Mr. Camarena at all. (Tr. 1068:5-17.) Of the witnesses asked, each one testified that not only were they not present during the alleged incident, but that the people with whom they spoke regarding the incident were also not present. (Tr. 942:25-943:12; 971:13-971:13; 996:25-997:17.) Not a single voting employee could, therefore, personally evaluate the alleged threat. And this is exactly the type of situation – this game of telephone and the spreading of contradictory rumors – that the Board has found insufficient to overturn elections. Therefore, to the extent that some information was disseminated among the employees, the rumors of the misconduct were meaningless and do not warrant the setting aside of the election.

Overall, the alleged threat did not create a general atmosphere of fear or intimidation that precluded the employees' free choice in the election. Indeed, as mentioned above, every single eligible employee voted in this election showing that no one was threatened. For these reasons, should the Board conclude that Mr. Placencia threatened Mr. Camarena with a knife, the dissemination of that information is still insufficient to overturn the election and the ALJ's Decision should not be overturned.

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VI. THE ALJ CORRECTLY DETERMINED THAT THE ELECTION SHOULD NOT BE SET ASIDE BASED UPON THE COMPANY'S ALLEGATION THAT AN EMPLOYEE RECEIVED HANG-UP PHONE CALLS TO HIS CELLULAR TELEPHONE

A. THE ALJ CORRECTLY CONCLUDED THAT THE COMPANY'S EVIDENCE OF THE TELEPHONE CALLS WAS INCONSISTENT AND UNRELIABLE.

Driver Ramsey Robles testified on the Company's behalf that he had received phone calls to his personal cell phone and when he answered his phone, the caller hung up. (Tr. 963:11-24.) First, the Company failed to prove that these telephone calls even took place, as its proffered evidence that was contradictory. The ALJ correctly concluded that there was *no evidence* tying the phone calls to the election or of who made the calls. (Decision 39:14-15.) Mr. Ramos testified regarding the phone calls, yet this was the only evidence that these phone calls even occurred. Mr. Ramos did not keep any record of the phone calls and did not present his phone at the hearing. He also never tried to call the phone number from which the calls were received. (Tr. 982:2-3.) The ALJ correctly concluded that this lack of action indicated that the telephone calls were not threatening. (Decision 39:16-18.) It likewise makes little sense that if the Union sought to intimidate or threaten voters with hang-up telephone calls, it would choose only one employee out of the entire pool of eligible voters to target.

The ALJ also correctly concluded that the Company's attempt to provide corroborating testimony of the telephone calls failed. (Decision 39:18-20.) Leonard Loya testified that Mr. Robles told him about these phone calls. (Tr. 1014:20-1015:1.) However, Mr. Loya testified that that when Mr. Robles answered the phone, the person on the other end shouted obscenities –

contrary to Mr. Robles' own testimony.[8] (Tr. 1015:2-6.) Significantly, in its brief, the Company contradicts not only Mr. Robles' testimony, but also the actual objection asserting that the person making the telephone calls used obscenities. (Resp. Brief, p. 75.) The Company's evidence is very inconsistent.

Further, Mr. Styers also testified that he thought it was Victor Cruz and not Mr. Robles who received the telephone calls. (Tr. 1321:9-10.)

Additionally, the witnesses' testimony was inconsistent, as Mr. Robles was asked whether the telephone calls made him scared, to which he responded, "No." (Tr. 981:7-11.) However, Mr. Loya testified that Mr. Robles told him that he was scared of the telephone calls – again contradicting Mr. Robles' own testimony. (Tr. 1021:25-1022:6.) Mr. Robles and Mr. Loya were the only two witnesses to testify regarding these phone calls, yet their inconsistent testimony fails to show that the phone calls actually occurred.

The Company failed to present consistent and valid evidence regarding the nature of the phone calls or that the phone calls even happened. Therefore, the ALJ's decision must be affirmed.

1. In Any Event, the ALJ Correctly Determined that Hang-Up, Anonymous Telephone Calls are Insufficient to Set Aside an Election.

The ALJ correctly determined that the third party conduct of anonymous, hang-up phone calls was insufficient to overturn the election. As noted by the ALJ, there was no competent testimony elicited from any witness as to who made the phone calls. Mr. Diaz denied instructing

[8] Actually, Mr. Loya first testified that the caller on the other end of Mr. Robles's telephone calls was silent. (Tr. 1015:15-16.) However, when asked on cross-examination, he stated that the person on the call was stating obscenities. (Tr. 1015:2-6.) Clearly, Mr. Loya's knowledge of these phone calls was lacking.

employees to make phone calls to other employees and certainly did not instruct employees to make phone calls to other employees and hang up on them. (Tr. 1590:12-23.) As stated above, there was absolutely no evidence of who was making these phone calls or what number the calls were coming from (even though this presumably could have easily been ascertained by Mr. Robles). And without evidence from whosever number the phone calls originated, there is absolutely no basis to attribute this conduct to the Union.

To the extent that it was shown that the telephone calls were received in the time leading up to the election, the timing of the phone calls could be merely coincidental and, in any event, this evidence is insufficient to prove that they actually occurred or were connected in any way to the election or the Union. Accordingly, there is no question that this conduct must be evaluated under the third party standard.

It is well settled that the Board will not set aside an election because of anonymous threatening phone calls "except in the most compelling case," because a contrary rule "would render the election proceeding vulnerable to the acts of cranks, pranksters, and anyone else who for some reason wishes to sabotage an election." *Monroe Auto Equipment Co.*, 186 NLRB 90, 96 (1970), enfd., 470 F.2d 1329, 1333 (5th Cir. 1972); *see also Amalgamated Clothing & Textile Workers Union, etc. v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984) (citing *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982) ("to overturn elections on the basis of such incidents would 'merely encourage anonymously created incidents.'"); *Bush Hog, Inc. v. NLRB*, 420 F.2d 1266, 1269 (5th Cir. 1969) ("[a]ny other rule would invite third parties or one of the protagonists who doubted the election outcome to anonymously create incidents and then attempt to use them to set aside the election"); *Mastec*, 356 NLRB 809 (similar). In *Mastec*, *supra*, the employer asserted objections based upon anonymous phone calls made to one employee two nights before the election, where the person calling stated that they would "get even" with the

employee if he "backstabbed" them. *Id.* at 810. Even though the threats were made close in time to the election and the caller actually made statements to the employee, this was insufficient to set aside the election. *Id.* Citing the District of Columbia Circuit, the Board concluded that "ordering a rerun election based on anonymous incidents could be both futile and 'devastatingly unfair' to the majority." *Id.* at 813 (citation omitted); *see also Pacific Grain Products*, 309 NLRB 690 (1992) (where union supporters telephoned an employee and told her that she would be fired if she did not attend a union meeting and requested her social security number, threat did not warrant setting aside election.)

A reasonable person would not be threatened by the phone calls received by Mr. Robles. In fact, Mr. Robles testified that he was not actually threatened by the phone calls. (Tr. 981:7-11.) Again the telephone calls were merely hang-up phone calls. Whoever did the calling said nothing, contrary to the above-cited case law. Further, there was no evidence that Mr. Robles ever tried to block the number from his phone – an action that would have easily halted the unwanted calls. (Tr. 1022:12-17.) If threatened or feeling harassed, a reasonable person would have taken the appropriate measures to stop the telephone calls. The fact that Mr. Ramos did not do this establishes the non-threatening nature of the alleged calls.

When compared to the case law cited above, mere hang-up telephone calls to a single employee with no actual statements by the person making the phone calls are clearly insufficient to set aside the election.

Moreover, this conduct was only directed at one eligible voter. Likewise, Mr. Robles also testified that the only bargaining unit employee he told of these phone calls was Mr. Loya, who did not in turn testify that he told anyone else about the telephone calls. There was no evidence that these phone calls even remotely caused a general feeling of fear among the voting employees. This allegation simply does not come close to the level of conduct sufficient to set

aside an election, as it did not create a general atmosphere of fear of reprisal; nor did it make a fair election impossible. For these reasons, the ALJ's decision must be affirmed.

VII. THE ALJ CORRECTLY DETERMINED THAT THE ELECTION SHOULD NOT BE SET ASIDE BASED UPON THE COMPANY'S ALLEGATION THAT AN EMPLOYEE RECEIVED A THREATENING TEXT MESSAGE

In regards to the allegations that threatening comments were made on the Change Con-Way to Win Blog, the ALJ correctly determined that the comments made on the blog were insufficient to overturn the election results. At the hearing, evidence was presented that Gerardo Lopez received a text message with a link to a post on the "Change Conway to Win" Website/Blog entitled, "Outing the Rats at ULX." (Tr. 936:9-16.) There was no other information sent in this text. (Tr. 936:17-20.) The link took Mr. Lopez to a post on the website about lies the Company was spreading regarding how employees would be responsible for paying employees' pensions at other terminals and that those employees could "dovetail" into the ULX roster with their seniority. (Resp. Ex. 7.) The post mentions Paul Styers and Ramsey Robles. (*Id.*)

Given that the link sent to Mr. Lopez did not concern him and was merely a link to a post on a website, it was not reasonable for him to be threatened by it. In fact, as noted by the ALJ, Mr. Lopez testified that he was only threatened by it initially, and after he realized his name was not mentioned in the comments, his reaction changed. (Tr. 949:25-950:7.) It is more reasonable for him to understand the text message as someone communicating to him regarding the Union and seeking his support, rather than a threat. The Company presented no evidence that the texting of the website link was a direct threat against Mr. Lopez or any other employee in the bargaining unit. *See NLRB v. Maryland Ambulance Servs.*, 192 F.3d at 436. And, contrary to

the Company's objections, on absolutely no grounds can this text message be interpreted to imply physical harm to anyone. On this basis alone, the Company's allegations must be dismissed.

In any event, there was no showing that this conduct was sufficient to set aside the election. Similar to the hang-up phone calls discussed above, there was absolutely no evidence presented of who sent the link to Mr. Lopez (even though this presumably would have been very easy to ascertain). Mr. Lopez testified that he did not know who sent him the text message. (Tr. 945:22-946:2.) Accordingly, like the phone calls discussed above, this is anonymous conduct, and as such, ordering a rerun election based upon such incidents would be both futile and devastatingly unfair to the employees. (*See* Section VI(A)(1) of this Brief.) Likewise, without evidence of who actually sent the text message to Mr. Lopez, the third party standard regarding objectionable conduct applies to this allegation as well.

The only evidence presented of this allegation was the sending of a single text message to a single employee. There was no evidence that other any other employees received a similar text message. There was also no evidence that this text message was widely disseminated among the eligible voters. Mr. Lopez testified that he only showed it to one other driver and that he did not forward it to anyone. (Tr. 946:14-20.) There was no evidence that the text message was disseminated further than that.

There was also no showing that the receipt of this text message created a general atmosphere of fear among the voting employees. Again, the text message was not connected to any threatening conduct. There was likewise no evidence that this "threat" was rejuvenated or repeated multiple times.

Contrary to the Company's assertions, the ALJ correctly determined that the receipt of a single anonymous text message by one eligible voter is insufficient to have the election set aside

and her decision should be affirmed.

VIII. THE ALJ CORRECTLY CONCLUDED THAT THE ELECTION SHOULD NOT BE SET ASIDE BASED UPON THE COMPANY'S ALLEGATION THAT COMMENTS WERE MADE ON THE CHANGE CON-WAY TO WIN BLOG

A. THE THIRD PARTY CONDUCT STANDARDS APPLY TO THIS CONDUCT.

In regards to the blog, the ALJ correctly applied the third party standard to this conduct, determining that the Respondent failed to establish that a Union agent published the "Change Con-Way to Win" blog. (Decision 38:23-25.)

The ALJ correctly noted that the Union did not create and/or manage the blog. (Decision 37:1.) The website/blog "Change Con-Way to Win" is not run by the Union. (Tr. 1588:23-1589:4.) Likewise, it was undisputed that the Union never instructed any employee to create the website or to post any information on it. (Tr. 1589:5-7; 1589:14-24.) The Union also did not post anything to the website. (*Id*.) Quite simply, the Union had nothing to do with the website. Because the website cannot be attributed to the Union, the third party conduct standard must be applied to these allegations as well.

The Company asserts that because the Teamsters insignia was placed on the website, the conduct can be attributed to the Union. However, Mr. Diaz testified that the website did not belong the Union, nor did the Union instruct anyone to create the website. (Tr. 1588:23-1589:7.) The website contains information regarding several other Union campaigns besides the campaign at ULX. (Tr. 944:19-945:4; 1002:16-25; 1024:11-20.) Anyone could have begun this website, and used the Union's insignia, so without offering evidence of who was responsible for it, this too must be considered anonymous conduct and analyzed under the standards set forth in Section VI(A)(1) of this Brief.

The ALJ also correctly concluded that while someone going by the name of "Jaime" made comments on the blog, the Company failed to establish that it was Mr. Romero. (Decision 37, fn. 55.) The Company did not even elicit any testimony from Mr. Romero on this topic, and the employees who testified that Mr. Romero posted these comments admitted that they could not be certain that it was Mr. Romero. (Tr. 989:25-990:4; 1062:16-25.)

In any event, even if Mr. Romero did post the comments, the Company failed to establish that Mr. Romero was an agent of the Union, nor does it argue that in its Brief.[9] Similarly, the Union in no way authorized or instructed this specific conduct. (Tr. 1589:1-7.) For this reason, the ALJ correctly applied the third party standard to this allegation.

1. The ALJ Correctly Determined that this Conduct Did Not Render a Free Election Impossible.

Here, the ALJ concluded that the blog did not have a reasonable tendency to influence the outcome of the election. (Decision 38:32-44.) The Company presented evidence that a total of three employees (including non-voter Mr. Styers) were mentioned in the comments on the "Change Con-Way to Win" website. (Resp. Ex. 7.) As already explained above, Mr. Styers and Mr. Robles were mentioned in the "Outing The Rats at ULX" post. Clemente Fuentes was mentioned in the comments section of that post. (*Id*. at p. 3.) One commenter asserted that he "thought [Mr. Fuentes] was a man you sorry ass punk." (*Id*.) Another comment stated, "Clemente pay the child support you're complaining about and don't be ignorant saying that you

[9] Like Mr. Placencia, Mr. Romero was also simply a Union supporter, and his involvement also did not make him an agent of the Union. Again, the Company provided very little evidence of Mr. Romero's agency status. Mr. Romero testified that he spoke with his co-workers over the phone and did visit employees' homes (with their permission). (Tr. 53:11-13.) Mr. Placencia also collected Union authorization cards. (Tr. 54:2-4.) Beyond this, very little evidence of Mr. Romero's active involvement in the Union was shown. Like Mr. Placencia, it was undisputed that Mr. Romero was not paid for his efforts, was not held out by the Union as an agent, he was not asked to lead any meetings on the Union's behalf, and generally did not have the authority to act for the Union. (Tr. 1575:22-25; 1586:11-14.)

will pay someone else's pension, you stupid fool." (*Id.*) The posts to the website are insufficient to overturn the election.

While the ALJ determined that the comments were "certainly derogatory and unkind," the posts to the blog were not directly threatening and do not provide a basis for overturning the election results. *See e.g., Teamsters Local 299 (Overnite Transportation),* 328 NLRB 1231, fn. 2 (1999) ("mere name-calling . . . does not generally warrant setting aside an election"); *Stonewall Cotton Mills*, 75 NLRB 762, 768 (1948) (overruling objection that petitioning unions used loudspeakers to direct "derogatory epithets" against several employees, as the loudspeaker utterances were in the nature of pre-election propaganda and the verbal attacks did not constitute intimidation or coercion of prospective voters); *see generally Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966) (acknowledging that the Board has concluded that epithets such as "scab" and "liar" are commonplace in labor struggles and not so indefensible as to lose the protections of Section 7 of the Act). Indeed, some conduct (from both sides) can be expected in any organizational campaign: "A certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election." *Cal-West Periodicals,* 330 NLRB at 600 (quoting *Nabisco, Inc. v. NLRB,* 738 F.2d 955, 957 (8th Cir. 1984)). Neither the post nor the comments are threatening against anyone – they are merely name-calling.

Similarly, threats that have nothing to do with employees' votes have been found insufficient to set aside elections. *See Cal-West Periodicals*, *supra*. The comments posted to the website were personal in nature and had nothing to do with the election, nor did they threaten employees for their votes. As such, the election should not be set aside based upon these comments.

It was also unreasonable for employees to be threatened by the comments on the website. Indeed, the actions of the employees who testified regarding the website establish that they were

not threatened. Each employee who visited the website had the choice to view the website. (Tr. 952:24-953:1; 1002:13-15; 1049:10-13; 1085:23-24.) No one forced the employees to do so. Each one also testified that they visited the website on their own time and on their personal electronic devices. (Tr. 945:5-10; 952:11-14; 976:4-21; 998:23-999:5; 1024:1-8; 1049:3-9; 1085:16-22.) Furthermore, most employees testified that even after seeing comments about themselves or their co-workers, they nevertheless visited the website multiple times. (Tr. 928:22-929:1; 990:22-991:1; 1007:1-3; 1023:10-15; 1048:19-23; 1055:23-1056:2; 1078:19-23.) Again, this was all on their own fruition and personal time. Repeatedly visiting a website does not indicate that that person was afraid or intimidated. Indeed, several employees testified that they were not threatened by the comments, that the comments on the website did not make them change their mind in the election, nor did anyone tell them that they changed their mind in the election due to the website. (Tr. 948:23-949:6; 979:17-19; 1001:10-25; 1026:11-1027:3; 1051:2-24; 1086:12-14.) *See Worley Mills, Inc. v. NLRB*, 685 F.2d at 367 (noting that no employee who testified was intimidated into changing his vote). Likewise, no other employees told the witnesses that they were scared to vote in the election after seeing the website. (Tr. 949:22-24; 1027:4-16; 1087:5-8.)

As correctly noted by the ALJ, Mr. Robles, an employee who was actually mentioned in the comments went so far as to state that he thought that it was "funny." (Tr. 959:21-24; Decision 37:40-41.) Other witnesses referred to the posts as "childish" and "a bunch of lies" – descriptions that do not equate to intimidation or fear. (Tr. 1008:14-17; Decision 37:40-38:1.)

The website also contains a lot of information and posts that concern unionization in general, includes a link to the NLRB website, and discusses other union campaigns. (Tr. 944:19-945:4; 1002:16-20; 1024:9-20; 1050:1-18.) Several of the witnesses' descriptions of the website establish that the entire thing was non-threatening, but instead merely provided the employees

with information and encouraged support of the Union. For instance, Mr. Loya testified that he visited the website because he was "[j]ust interested in seeing what people were saying." (Tr. 1024:9-10.) Mario Cruz testified that the website "encourage[ed] people to vote for [the Union.]" (Tr. 1050:13-18.) These comments demonstrate that the website was informative rather than threatening. On the other hand, the Company's evidence concerned only a *single* post and its accompanying comments. Contrary to what the Company would have the Board believe, the breadth of the website was much more than this single post and the overall website was not threatening or intimidating.

Additionally, the comments that were testified to were not easily located – a reader of the website had to search for this information. Clemente Fuentes testified that he had to scroll down the webpage to locate the comments that specifically mentioned his name. (Tr. 999:24-1000:4.) Further, Mr. Lopez and Mr. Loya testified that a reader had to actually click a link to make the comments appear. (Tr. 947:21-948:11; 1024:25-1025:4.) In fact, as admitted into evidence, the comments testified to were on the twelfth page of the comments section. (Tr. 937:16-23; Resp. Ex. 7.) Accordingly, the alleged objectionable conduct was not brazenly in the faces of anyone. This further makes the posts to the website much less threatening.

Contrary to Respondent's Brief, there was <u>no</u> evidence presented of Respondent's exaggerated claim that, "the teamsters logo was seen every day by ULX employees on the website." (Resp. Brief, p. 71.) In fact, Respondent's Brief is further misleading in attempting to show how many employees actually visited the website. In its citations to the transcript, it cites the same witness' testimony multiple times. (*Id.*, p. 73.)

In actuality, there were only a total of six eligible voters who testified to seeing the website, and the comments made on the website only referenced two eligible voters – Mr. Ramos and Mr. Fuentes. Mr. Lopez testified that he did not know whether any of his co-workers

accessed the website. (Tr. 938:22-24.) Some witnesses likewise testified that they did not speak to any of their co-workers regarding the website. (*Id.*; Tr. 1079:19-22.) There was no evidence, therefore, that the website or the comments were widely disseminated among the voting employees. It is significant that the evidence presented at the hearing was a mere snippet of the information and posts actually on the website. So, even if other bargaining unit employees visited the website, it cannot be assumed that a large portion of the voters actually saw the comments or specific posts the Company considers to be objectionable conduct.

There was simply no evidence that these comments/posts reached a large portion of the employees or otherwise created a general atmosphere of fear, confusion, or intimidation. For these reasons, the ALJ correctly found that the posts to the website were insufficient to set aside the election.

IX. CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Company's objections are overruled in their entirety, that the election is finalized, and that the Union is certified as the exclusive representative of the employees.

Dated: March 21, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of March 2016, I e-filed the Teamsters Local 63's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision with the Office of the Executive Secretary of the NLRB on the NLRB's e-filing system, and served a copy of this Brief by electronic mail upon the following:

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